

STATE OF MICHIGAN
COURT OF APPEALS

DAVID BABCOCK,

Petitioner-Appellant,

v

STATE OF MICHIGAN, DEPARTMENT OF
TRANSPORTATION, and MICHIGAN CIVIL
SERVICE COMMISSION,

Respondents-Appellees.

UNPUBLISHED

June 18, 1999

No. 200992

Ingham Circuit Court

LC No. 96-083681 AA

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

The Michigan Department of Transportation (MDOT) discharged petitioner for misconduct, and petitioner filed a grievance. At the subsequent four-step grievance hearing, the hearing officer found that petitioner had not engaged in misconduct, but had a performance problem that should have been dealt with through the use of corrective discipline and not dismissal. MDOT appealed. The Michigan Civil Service Commission Employment Relations Board agreed with the hearing officer that dismissal was not warranted, although it found that petitioner had engaged in misconduct. MDOT again appealed, whereupon the Civil Service Commission reinstated petitioner's dismissal. Petitioner then appealed as of right to the circuit court, which upheld the Civil Service Commission decision. Petitioner now appeals to this Court by leave granted, and we reverse.

The Civil Service Commission was established by the Michigan Constitution and is charged with establishing the terms and conditions of employment for those who hold positions in the classified state civil service. Const 1963, art 11, § 5. The Civil Service Commission is obligated to follow rules that it has established regarding the terms or conditions of employment in the classified civil service. *Battiste v Dep't of Social Services*, 154 Mich App 486, 493; 398 NW2d 447 (1986). According to § 2-10.3 of the Civil Service Rules:

An employee in the classified service may be dismissed, demoted, or suspended for any of the following three reasons:

(a) Failure to carry out the duties and obligations imposed by these rules and by agency management.

(b) Conduct unbecoming a state employee.

(c) Unsatisfactory service.

The circuit court succinctly stated the actions that led to petitioner's dismissal as follows:

The discrepancies included three incidents between December 2nd of 1993 and June 14th of '94 where petitioner failed to report personal mileage; four incidents between November 1st, 1993, and January 18th, 1994, where petitioner wasted state time by failing to properly plan his travels between the Alpena office, his home, and other work sites; and eight of nine travel reports were submitted one to eight weeks late.

While both the hearing officer and the employment relations board rejected MDOT's decision to dismiss petitioner for the above misconduct, the Civil Service Commission reinstated petitioner's dismissal and the circuit court affirmed. The circuit court's review was limited to determining whether the administrative action was authorized by law and the decision was supported "by competent, material and substantial evidence" when reviewing the record as a whole. *Boyd v Civil Service Comm'n*, 220 Mich App 226, 232; 559 NW2d 342 (1996). Substantial evidence is defined as being "more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Great Lakes Div of National Steel Corp v Ecorse*, 227 Mich App 379, 388; 576 NW2d 667 (1998). The word "substantial" means "evidence that a reasonable mind would accept as sufficient to support the conclusion." *Id.* at 389.

We review the circuit court's direct review of the administrative agency's action to determine "whether the lower court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd, supra* at 234.

This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. [*Id.* at 234-235.]

Petitioner first contends that the circuit court grossly misapplied the substantial evidence test where it concluded that petitioner had engaged in intentional misconduct. We disagree. In affirming the Civil Service Commission conclusion that petitioner "knowingly and intentionally engaged in misconduct", the circuit court stated:

Petitioner further argues that the Commission's decision must be reversed because the record did not support the finding that he committed intentional misconduct.

As noted, petitioner asserted from the outset of this matter that the second set of discrepancies were due to his interpretation of the Department's policies or an oversight.

However, the Court is of the opinion that through the 1993 audit settlement process and following petitioner was adequately apprised of the Department policies.

Additionally, there is no evidence that if petitioner was uncertain of the policies, that he contacted his supervisors for clarification before he submitted the reports for which he was disciplined.

At the hearing petitioner omitted from his testimony his interpretation of the policies. And he failed to explain how his interpretation differed from that of the Department. Instead he testified that he had no intent to defraud his employer.

In light of this situation, and in viewing the entire record, the Court is satisfied that the Commission's finding of intentional misconduct was supported by competent, material, and substantial evidence.

There was evidence on the record that petitioner was aware, following the 1993 audit report and subsequent resolution of his grievance over MDOT's claim for past personal mileage, that his prior practices with regard to record keeping and mileage allocation would no longer be acceptable. Although petitioner claims that he had generally asked for clarification of the reporting rules, there was no evidence on the record that he asked for assistance or clarification when filing the reports for which he was disciplined. Petitioner argues that the reporting requirements were ambiguous. However, he was provided with MDOT operating instructions regarding the proper method of reporting mileage. And, while there was evidence that petitioner had questions about how to apply those policies, there was ample evidence that he took great effort to avoid any personal financial burden that he might incidentally incur if he followed the proper reporting rules and utilized his assigned state vehicle in the most logical manner. Thus, we conclude that there was substantial evidence to support the Civil Service Commission conclusion. In light of the circumstances, we cannot conclude that the circuit court grossly misapplied the substantial evidence test in affirming that petitioner had engaged in intentional misconduct.

Petitioner next argues that the circuit court applied incorrect legal principles when it affirmed petitioner's dismissal even though the dismissal was made by MDOT without first considering progressive discipline. We agree.

In *Battiste, supra*, the petitioner was dismissed by the Department of Social Services (DSS) for conduct unbecoming a state employee and failure to carry out the duties and obligations of his office. The dismissal was in response to one incident wherein the petitioner and his supervisor conflicted over a policy implemented by the director of the DSS. The petitioner had previously served the DSS for numerous years without incident. The hearing officer, the Employment Relations Board, and the Civil Service Commission itself affirmed the petitioner's dismissal. The circuit court, however, held that under the circumstances, dismissal was inappropriate. A panel of this Court affirmed the decision of the circuit

court. *Id.* at 492-495. This Court noted that progressive discipline may be utilized at the discretion of the Civil Service Commission. *Id.* at 493. It then concluded:

A single incident of misconduct may be so gross and egregious as to warrant dismissal. However, where an employee's previous record is unblemished, we believe that a department's failure to *consider* progressive discipline renders its decision-making arbitrary. . . . This Court does not second guess departmental decision-making. Nonetheless, where an agency has the discretion to act in a certain manner, this Court must see that the discretion is exercised where appropriate, and not abused in the process of its exercise.

To the extent the record supports an inference that the department ruled out progressive discipline as a practical alternative because of petitioner's stated intention not to accede to legitimate authority, we must again conclude that such an exercise of discretion is arbitrary and capricious. [*Id.* at 493-494 (emphasis in original).]

In this case, the circuit court was "of the opinion that there is no evidence in the record to indicate that the Department [MDOT] failed to consider other forms of discipline." We disagree with the circuit court, and find that the record supports an inference that MDOT did not consider other forms of discipline at all. Petitioner's supervisor testified that *prior* to the disciplinary conference, "the Department [MDOT] had made a decision to terminate Mr. Babcock unless something come [sic] up during the course of the disciplinary conference, to change that." At the disciplinary conference, petitioner's supervisor read from a *previously* prepared document, which informed petitioner of his termination. This testimony does support an inference that other forms of discipline, short of termination, were *not* considered. Petitioner was going to be fired unless he offered some unspecified mitigating circumstances during the disciplinary conference, at which point lesser discipline might then presumably have been considered. Where the record supports an inference that MDOT failed to consider any discipline short of termination and where petitioner was an employee with twenty-seven years of service and an unblemished record, MDOT's dismissal of petitioner was inappropriate. *Battiste, supra.*

In making our ruling, we note that unlike the circuit court, we find that there was no evidence to support that petitioner's service record was blemished. In fact, during plaintiff's twenty-seven year tenure, he had never been counseled or disciplined. The fact that petitioner previously engaged in a grievance proceeding related to reporting his mileage is not evidence that his service record was anything less than exemplary. The grievance proceeding was not a disciplinary proceeding and while it put petitioner on notice that his previous reporting was not acceptable and that he was required to and expected to correct his reports and conform to the reporting rules, it had no disciplinary component to it. We believe that by its nature, progressive discipline puts an employee on notice that failure to rectify certain conduct will result in more severe penalties. We agree with the reasoning and rationale in *Battiste* that when a change in an employee's attitude is sought, progressive discipline is "the preferred method in bringing about that change." *Id.* at 494.

It was clearly erroneous for the circuit court to affirm the Civil Service Commission's decision to fail to apply the principles set forth in *Battiste, supra* to this case. There was not substantial evidence in the record to support that *Battiste* did not apply, and our review of the whole record leaves us with a definite and firm conviction that the circuit court erred. For that reason, we reverse the decision of the circuit court, and remand to the Civil Service Commission for entry of an order affirming the decision of the Employment Relations Board. The disciplinary order of the Employment Relations Board was reasonable and supported by substantial evidence on the record.

Petitioner also contends that MDOT's decision to terminate him, while only issuing a two-week suspension to his Upper Peninsula counterpart for the same conduct, was improper and that the circuit court failed to apply the correct legal principle when it upheld the penalty. Petitioner essentially argues that MDOT had a duty to discipline employees with an equal hand for similar conduct. We note that while petitioner presented this issue to the circuit court, the circuit court made no comparisons between petitioner's penalty and the penalty received by petitioner's counterpart or between petitioner's penalty and the penalties of other civil servants whose cases were pointed out by petitioner. We do not believe, however, that the circuit court failed to properly apply the law when it decided not to accept plaintiff's argument. While we agree that the Civil Service Commission has a duty to fairly and equitably treat employees, we believe that there was substantial evidence in the record to conclude, as did the hearing officer, that petitioner was not similarly situated to his upper peninsula counterpart. Petitioner's counterpart received a two week unpaid leave for filing a late set of reports and failing to report personal mileage on three occasions. This conduct was of a lesser extent and frequency than petitioner's conduct.

The order of the circuit court, affirming the Civil Service Commission's decision to reinstate petitioner's dismissal is reversed. Accordingly, we remand to the Civil Service Commission to enter an order affirming the Employment Relations Board decision. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy